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TAY AH KOW & ANOR.

v.

CHUA HEE TENG & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU

MAHADEV SHANKAR J

b

[CIVIL SUIT NO. 118 OF 1982]

11 NOVEMBER 1984

DAMAGES: *Motor Accident - Liability agreed to be apportioned - Determination of quantum - Whether nexus has been established - Doctor who examined victim not a neuro-physician - Effect of - Award of damages.*

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This is a claim for damages arising out of a motor accident. The parties had agreed that liability should be apportioned. The only issue to be decided is the quantum. The crux of the submission was that the doctor who examined the victim (plaintiff), was himself not positive as to the existence of a cerebral laceration and consequently there is no *nexus* between the plaintiff's present condition and the proven injuries which he sustained in the accident.

*d***Held:**

[1] Though the doctor was not a neuro-physician, his medical report appears in the Agreed Bundle, therefore his statement that the plaintiff probably suffered from cerebral laceration as a result of the accident was enough in itself to shift the onus of proof on the defendants.

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[2] The submission of the defence that the *nexus* was not established is without merit.

[3] Award to the 2nd plaintiff;

General damages	RM500
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Special damages (Damages to the bicycle and loss of earnings)	RM200
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RM700

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Less 10% contributory negligence	70
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Total award to the 2nd plaintiff	RM630
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[4] By a supplementary amended judgment, the correct computation of damages payable by the defendants to the 1st plaintiff shall be as follows:

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(a) General damages	RM 45,000
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(b) Pre-trial loss of earnings	9,000
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(c) Post-trial loss of earnings	12,000
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(d) For nursing care	8,400
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(e) Special damages	
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(Damages to bicycle and transport expenses)	500
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RM 74,900

Less 10% contributory negligence on the part of the 1st plaintiff	7,490
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Total award to the 1st plaintiff	RM67,410
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For the plaintiffs - E. Ramasamy; M/s. E. Ramasamy & Co.
For the defendants - Matthew Varughese; M/s. Varughese & Co.

JUDGMENT

Mahadev Shankar J:

This is a claim for damages arising out of a motor accident.

The parties have agreed that liability should be apportioned 90% to the defendants and 10% to the plaintiffs.

Therefore this Court is now only concerned with quantum.

The 1st plaintiff is now unable to walk or use his hands. He also suffers from amnesia. Counsel for the defendants has submitted that the nexus between the plaintiff's present condition and the accident has not been proved. He says that following upon the accident the 1st plaintiff was found to have only the following external injuries namely:

1. Haematoma left frontal region and also on right infra orbital region.
2. Superficial lacerations over the left parietal region and 1 cm. laceration over the left forearm, and left elbow (2cm.).
3. Laceration, 3 cm. in size, over the second metacarpal bone.

There were no fractures whatsoever of the skull or the spine.

On the 30 July 1982 the 1st plaintiff was seen by Dr. M. V. Kumar a Consultant Surgeon in private practice. Counsel for the defendant has emphasized that Dr. Kumar is not a neurosurgeon neuro-physician. In his report dated 18 August 1982 Dr. Kumar says that he did not detect any abnormality in the cardiovascular or respiratory system. His central nervous system was found to be normal and but for the amnesia his orientation was good, his speech was normal, and his sensation to pain and touch were also normal.

However, all the muscles of both upper limbs and lower limbs have increased tone and were spastic. Contractures of various muscles had resulted in deformities of the limbs. Without going into the medical detail spelt out in the report, suffice it to say that there was severe limitation of movement in both the upper limbs, and so far as the lower limbs were concerned, there were very limited movements in the hips, knees and feet.

But the x-rays showed no abnormalities except that the cervical and lumbosacral spine showed osteoarthritic changes due to age and **Not Due To The Accident**. The plaintiff could stand but only with support and he is not able to walk steadily.

As to the cause of this condition Dr. Kumar stated as his opinion that the plaintiff has probably suffered from cerebral laceration as a result of the accident which has left him with residual spasticity and deformity of the upper and lower limbs which deformities were permanent and incapacitated the 1st plaintiff from any occupation. The crux of the submission of defence Counsel is that Dr. Kumar is himself not positive as to the existence of a cerebral laceration and consequently there is no nexus between the plaintiff's present condition and the proven injuries which he sustained in the accident.

- a* I have given anxious consideration to this submission and find as follows. It is clear from the pleadings that it is common ground that immediately prior to the accident, the 1st plaintiff was riding his bicycle on a public road at night together with the 2nd plaintiff. In order to do this, I infer that he must have had the normal use of all his limbs. About an hour after the accident when he was examined by the doctor at the Muar Hospital into which he was admitted, it was found that he had just recovered from total loss of consciousness. In a
- b* semi-conscious state he responded to questioning but apart from the superficial injuries found on him it was also observed that he had a weakness of the upper limbs and paralysis of the lower limb.

- c* Admittedly Dr. Kumar is not a neuro-physician but his medical report appears in an Agreed Bundle of Documents. Since it appears as an agreed document Dr. Kumar's statement that the 1st plaintiff probably suffered from cerebral laceration as a result of the accident was enough in itself to shift the onus of proof on to the defendants if they wished the Court to find that this statement was not to be accepted at face value.

Civil cases are decided on the balance of probabilities and the defence called no evidence in this case.

- d* The defence submission that nexus was not established is consequently without merit. Having disposed of this argument we can now quickly deal with the rest of the case.

- e* Relying upon the authorities cited plaintiff's Counsel submitted that the proper award for loss of amenities, pain and suffering should be RM80-RM100,000. Counsel for the defence however pointed out that in all the precedents cited, the plaintiff had sustained fractures or other internal injuries which would undoubtedly have caused severe pain and suffering. In this case however the remarkable fact is that there were no fractures whatsoever and no visible evidence of any internal injuries. Besides unlike the other cases the 1st plaintiff here does not suffer from any loss of bowel or bladder movements and he is fully compos mentis except for the amnesia relating to events soon after the accident.

- f* In these circumstances I hold that the proper award for loss of amenities, pain and suffering should be RM45,000 for the 1st plaintiff.

- g* As to the 1st plaintiff's loss of earnings the parties have agreed that his monthly earnings as a rubber tapper at the time of the accident was RM215 per month but there was a contest as to whether he also earned extra money as a weeder. I hold that the 1st plaintiff's claim that he regularly earned about RM200 per month as a weeder was exaggerated and not at all proved to my satisfaction. The 1st plaintiff's own employer did not engage him as a weeder because he was of the view that the plaintiff's energies were fully occupied as a tapper. The 1st plaintiff did not work for his own employer as a weeder at all. However other witnesses were called to show that rubber tappers do earn some side money as weeders for small-holders and I am prepared to allow something for this. The evidence is that weeding takes place at intervals during the year and I grant the plaintiff RM400 per annum for this making his total monthly income say RM250.

- h* So for pre-trial loss of earnings up to date of trial I award him 36 months which comes to RM9,000.

- i* For loss of future earnings, it is noted that the plaintiff is now 56 years old. His osteoarthritic changes are not due to the accident, and I feel that 4 years is a reasonable multiplier. This will yield a further RM12,000.

The next item to consider is a claim for nursing care. The case put forward for this item, was that the 1st plaintiff's wife had been earning RM400 per month as a rubber tapper and that she had given up this lucrative income to devote her full time to the care of her husband but the evidence fell very far short. The plaintiff's wife's own employers disclosed that she had only been working for 7 months prior to the accident and during that time she was earning only a monthly average of RM113 with EPF contributions of RM20 per month. However the 1st plaintiff's condition is such that I am satisfied that he needed and will need extra help and I think that a recompense of RM100 per month for 7 years is a fair figure which gives RM8,400 for this item. The special damages in terms of transport expenses have also been exaggerated, the items for nourishing food and outpatient treatment have not been proved and the fee for the specialist examination is said to be proposed for inclusion as an item of the costs to be taxed. So I allow only RM500 for the transport expenses and for the bicycle.

I now turn to the 2nd plaintiff. He was admitted into the hospital 3 days after the accident with a complaint of pain in the back. He was given treatment and discharged on 24 September 1981. He claims that he could not work for a month but I am unable to accept this in the light of the medical report. I hold that RM500 is a reasonable award for general damages and RM200 for his specials which is to cover the damage to his bicycle and also his loss of earnings during the period of total temporary disability.

In the result the award for general damages for the 1st plaintiff is RM62,400 and for special damages RM500. For the 2nd plaintiff the award is RM500 for general damages and RM200 for special damages. Interest will run on the special damages at 4% per annum from the date of the accident to the date of this judgment. There will also be interest at 6% per annum on the general damages for loss of amenities and pain and suffering from the date of the service of the writ up to the date of judgment.

Thereafter interest on the decretal sum will be payable at 8% per annum as from the date hereof. In view of the apportionment the plaintiffs will only be entitled to 90% of the sums which I have awarded, so the total award to the 1st plaintiff is RM56,610 and to the 2nd plaintiff RM630.

The plaintiff will also have their costs of this action to be taxed by a proper officer of this Court.

SUPPLEMENTARY JUDGMENT

Mahadev Shankar J:

Since this judgment was delivered and before the Order thereon extracted, it was brought to my attention by the plaintiffs' Solicitors that there are certain arithmetical errors of calculation in the computation of damages to be paid to the 1st plaintiff on the basis of the liability as apportioned.

Taking into account the corrections to be made I now amend my judgment accordingly and hereby adjudge that the nett sums payable by the defendants to the 1st plaintiff shall be as follows:

(a) General damages	RM45,000
(b) Pre-trial loss of earnings	<u>RM 9,000</u>
(c) Post-trial loss of earnings	RM12,000
(d) For nursing care	RM 8,400
(e) Special damages (Damages to bicycle and transport expenses)	<u>RM 500</u>
	<u>RM74,900</u>

<i>a</i>	Less 10% contributory negligence on the part of the 1st plaintiff	RM 7,490 RM67,410
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Therefore the total award to the 1st plaintiff is RM67,410.

<i>b</i>	Also found at [1984] 2 CLJ 304
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